SC 85053

IN THE SUPREME COURT OF MISSOURI

KATHERINE LOUISE HELSEL,
Respondent,
v.

SIVI NOELLSCH, D.C. (now Sivi Helsel, D.C.),
Appellant.

NEW BRIEF OF THE APPELLANT

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Preliminary Statement

This case presents this Court with the inconsistency of its abolition of the tort of criminal conversation in *Thomas v. Siddiqui*, 869 S.W.2d 740 (Mo. banc 1994), and the continuing existence in Missouri of a cause of action of alienation of affection. This Court can address this jurisprudential inconsistency by either reversing its holding in *Thomas* and reinstating criminal conversation in Missouri law, or it can now abolish alienation of affection as a claim in Missouri.

The appellant urges the Court to abolish.

Respondent Katherine Helsel sued Appellant Dr. Sivi Noellsch for alienation of affection. She obtained a jury verdict of fifty thousand dollars actual damages and twenty-five thousand dollars punitive damages. The appellant's evidence was that she did not have any romantic relationship with Mr. David Helsel until after he had separated from Katherine and had filed for divorce. David pursued Dr. Noellsch, not vice-versa. Dr. Noellsch and David Helsel are now married and the appellant's name, since before the trial, has been Dr. Sivi Helsel.

Dr. Noellsch seeks the abolition of the cause of action. In the alternative, she seeks to have the judgment set aside because the respondent failed to present a submissible case.

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Jurisdictional Statement

This is an appeal from a judgment for damages entered upon a jury verdict in the Circuit Court of Buchanan County for alienation of affection.

The case was transferred to this Court by its own order pursuant to Rule 83.01.

The Supreme Court of Missouri had jurisdiction over this case in its capacity as "the highest court in the state," Article V, Section 2, Constitution of Missouri, and the Court's power to establish rules of procedure, Article V, Section 5.

Revised Statement of Facts

(The appellant's counsel had wanted to avoid stating the intimate details of David and Katherine's marital relationship but, in accordance with the Court's order, now presents the following revised Statement of Facts).

In November, 1998, Dr. Mary Huss, a chiropractor, was treating her patient, David, for his neck problems (Tr. 158, 159). Thereafter, Dr. Huss's associate, Dr. Sivi Noellsch, began to provide David Helsel with care and treatment because Dr. Huss often was not at her office (Tr. 158, 159). Dr. Noellsch treated David Helsel during 1999 (Tr. 163-164). She also treated Katherine Helsel as well (Tr. 344, 348) Katherine Helsel testified that she believed that significant difficulties in her marriage with David began sometime in December, 1999 (Tr. 229). She had no evidence to support her belief other than David was gone with his friends for some periods of time and he made comments about her body weight and appearance (Tr. 246). Both Dr. Noellsch and David Helsel testified that their relationship was strictly professional during this time period (although they later became friends) and that no sexual relationship existed until after he filed for divorce (Tr. 58).

David and Katherine Helsel were married in 1996 (Transcript 225). Their first child was born in 1997 (Tr. 334). After the birth of the first child, David testified that Katherine Helsel refused to have sex with David Helsel for a number of months (Tr. 338-339). In April, 1999, they discussed divorce (Tr. 340).

According to David, a week went by and Katherine then stated she wanted more than one child (Tr. 340). David testified that he then informed Katherine that he was strongly opposed to having any further children (Tr. 340). David testified that he thereafter continued to emphasize to Katherine his very firm position that he wanted no additional children (Tr. 344, 348, 439-441).

Katherine testified that following the argument in April, 1999, she and David began to talk about plans to have a second child (Tr. 230-31). Katherine testified that the only objection David expressed concerning having a second child was financial in nature (Tr. 231). Katherine stopped taking birth control pills in April, 1999, (Tr. 232) and Katherine testified that she and David began using condoms at that point to ensure the birth control hormones were out of her system (Tr. 233). Katherine testified that in July or August, 1999, she and David stopped using condoms and continued to have intercourse one to two times a week. (Tr. 234). David testified that Katherine stopped taking birth control in April of 1999, when they discussed divorcing (Tr. 175). David testified that Katherine refused to have intercourse with the use of condoms and that the two did not have intercourse from April until August of 1999 (Tr. 175). David testified that Katherine told him in August that she had resumed taking birth control pills and had been taking them for at least thirty days prior (Tr. 176). David and Katherine Helsel conceived

another child in August, 1999 (Tr. 344, 348). Katherine informed David that she was pregnant when he returned from a hunting trip. Katherine testified that when David learned that she was pregnant, David was smiling and appeared excited (Tr. 237). David testified that upon learning Katherine was pregnant, he felt nauseated and had to walk away (Tr. 177). David testified that during the same hunting trip, he had already decided that he would divorce Katherine (Tr. 349) and planned to tell her about his intention but changed his mind about telling her at that time after learning that she was pregnant (Tr. 177). Katherine testified that after telling David about the pregnancy, the two had sexual intercourse that evening (Tr. 237). David testified that the couple had not planned on having the second child and he felt that Katherine had tricked him into the pregnancy (Tr. 178, 348-354, 439-442). David made his decision to divorce Katherine in September of 1999, but he felt he could not file legally while Katherine was pregnant (Tr. 168, 353). The day after finding out Katherine was pregnant in September, 1999, David spoke to his corporate attorney, Brent Powers, about divorcing Katherine (Tr. 353). Mr. Powers testified that he told David he should wait until after the baby was born because the court would not divorce them until after the baby was born (Tr. 425). David decided to wait until after the baby was born (Tr. 167). David testified that he had stopped loving Katherine long before September, 1999 (Tr. 168).

While David expressed interest in temporarily improving their relations for

the sake of their daughter's Christmas experience in 1999 (Tr. 354), he maintained that the marriage could not be preserved (Tr. 355, 385). David testified that he had sexual intercourse with his wife during the end of November through Christmas, because, even though he planned on divorcing Katherine, he wanted to see if it might work out between them (Tr. 357). He testified that it did not work out between them, and he considered the intercourse to be "just sex" (Tr. 357).

David testified that in October of 1999 a woman named Danielle showed a romantic interest in him (Tr. 186-87). David testified in his deposition that he told Danielle that he was married, his wife was pregnant, and "it wasn't going to happen between the two of them" (Tr. 187). David testified at trial that he told Danielle that there would a time and a place for the relationship later (Tr. 187). When asked by counsel for the respondent whether Danielle was an attractive person who had blonde hair and a big bust, David Helsel affirmatively responded (Tr. 186-187).

Dana Poese was David Helsel's office manager (Tr. 199). According to Mrs. Poese, at a Christmas party in early to mid-December, 1999, Katherine and David appeared to be happy and there appeared to be no animosity between them (Tr. 120-121). David testified that he and Katherine ate and danced together at that party (Tr. 220). Mrs. Poese also testified that in December, 1999 David received a

watch, silk boxers, a shirt, and a couple of other gifts (Tr. 127). She testified that David told her who sent the gifts (Tr. 127). (Contrary to the respondent's Statement of Facts, she did not testify that Dr. Noellsch sent the gifts to David.) She also stated that David received flowers at his office two times prior to June, 2000, from Dr. Noellsch (Tr. 128). In January, 2000, David went to Dr. Noellsch's office to show her a deer that he had killed (Tr. 75). The respondent states in her Statement of Facts that David and Dr. Noellsch began working out at a gym together in February, 2000, citing Tr. 72. Dr. Noellsch testified that the two ran into each other at the gym during this period and that she would ask David to spot her if he happened to be there, but that the two did not start working out together until after they began dating in June (Tr. 72). On two occasions when David forgot to bring his pass in March, 2000, Dr. Noellsch took David as her guest to the gym (Tr. 107). In February or March, 2000, David brought Dr. Noellsch into his office, where she met Ms. Poese for the first time (Tr. 122). According to Mrs. Poese, Dr. Noellsch came into David's office in a shirt with her cleavage showing (Tr. 124). For a few weeks prior to that time, Mrs. Poese stated that Dr. Noellsch had been calling David at the office (Tr. 123). She believed that this contact by a woman other than his wife was not normal or regular (Tr. 124). She expressed her uncomfortable feelings to David (Tr. 124). Prior to June, 2000, David also received cards and letters at his office, on which Mrs. Poese observed Dr.

Noellsch's signature (Tr. 128). Mrs. Poese stated that David seemed flattered by the gifts (Tr. 133).

David testified that, until the day Dana Poese testified, that he thought that he had ended his business relationship with Mrs. Poese amicably (Tr. 190). After Mrs. Poese's courtroom testimony, David then testified that Mrs. Poese had flirted with him during his marriage (Tr. 189). David admitted, however, that in his deposition of August 28, 2000, he had stated that no one other than Danielle had shown an interest or flirted with him during his marriage to Katherine (Tr. 189). David also admitted that in his deposition he had stated that he ended his business relationship with Mrs. Poese on a positive note (Tr. 190). Dr. Noellsch testified that Mrs. Poese was disgruntled and jealous of her (Tr. 479).

During the months of March, April, and May, 2000, Dr. Noellsch was involved in a legal dispute arising from a non-compete agreement with her former employer, Dr. Huss (Tr. 64-65). On several occasions, Dr. Noellsch consulted with David Helsel, who had prior experience with a non-compete agreement, and sought his business advice on how to cope with this during repeated telephone business conferences during those three months (Tr. 78-80, 105). Dr. Noellsch's cell phone records, beginning on March 30, 2000, were admitted into evidence (Tr. 97-98, RX 7). David gave Dr. Noellsch his cell phone number in February, 2000

(Tr. 90). A cell phone was placed in Dr. Noellsch's name at the end of March, 2000 (Tr. 91). Prior to that time, her cell phone records had been in her former husband's name (Tr. 91).

By the end of March, 2000, on some days, Dr. Noellsch was calling David Helsel as many as eight times (R.A. A5). Dr. Noellsch testified that she called David on his cell phone six times on the day his second daughter was born (Tr. 101, R.A. A24). She also called him at 1:36 a.m. the following morning (Tr. 103, R.A. A24). Dr. Noellsch called David four times on the day he first filed for divorce from Katherine (Tr. 96, R.A. A27). Dr. Noellsch admitted that by this time in May, 2000, she was calling David probably ten times a day (Tr. 99). She would call sometimes call David late at night (Tr. 91, R.A. A5-A29). Between March 30, 2000, and May 30, 2000, Dr. Noellsch placed many cell phone calls to David either at his office or on his cell phone (R.A. A5-A29). She did not place calls to his home (Tr. 92).

After telling Katherine in April, 2000 that he wanted a divorce, Katherine asked that David go to marriage counseling (Tr. 249, 355, 356). David did not want to go to counseling (Tr. 249). David told Katherine that the marriage was over (Tr. 250). Rather, David told Katherine in April "you need to sign that school contract [for next year] because I'm leaving when the baby's here" (Tr. 168). David testified that he had stopped loving Katherine long before September of

1999 (Tr. 168). On May 12, 2000, their second child was born (Tr. 101, 253). Shortly thereafter, on May 25, 2000, David filed for divorce in Clinton County, Missouri (Tr. 95, 270, 357).

In May, 2000, David was angry about the second baby and felt betrayed by Katherine (Tr. 184). He informed Dr. Noellsch that he had filed for divorce (Tr. 184). In June, 2000, he expressed to Dr. Noellsch for the first time his interest in being more than just a friend (Tr. 162, 461-462, 479). Dr. Noellsch at first refused to date him because he was her patient (Tr. 462). She encouraged him to get counseling (Tr. 461). However, because he had separated from his wife, he had filed for divorce, he had decided to no longer be her patient, and his repeated requests, she eventually reconsidered (Tr. 162, 462). Dr. Noellsch stated she did not, in any manner, pursue or encourage David to leave Katherine (Tr. 471). David stated that it was he who pursued Dr. Noellsch (Tr. 118).

Katherine testified that their conversations in late May of 2000, following her C-section and his vasectomy, gave Katherine hope that her marriage could be saved (Tr. 265-268). Katherine testified that she would feel like they were making headway, and then the next day David would again be negative (Tr. 267). Katherine testified that she and her husband had intercourse six weeks after the birth of their second child, in June or July of 2000 (Tr. 319). Katherine testified

that she thought David was still giving her hope that her marriage could be saved (Tr. 265-269).

In June or July, 2000, David had informed his wife, after they had been separated, that he had developed a physical as well as social relationship with Dr. Noellsch (Tr. 293, 295). Dr. Noellsch had felt that since David and Katherine were now separated and no longer committed to one another, David was free to have new social relationships (Tr. 462). Finally, in the second or third week in June, 2000, Dr. Noellsch went out socially with David for the first time (Tr. 459, 461).

Up until the end of June or early July, 2000, Katherine still believed that her marriage could be saved (Tr. 254). She then learned of David's relationship with Dr. Noellsch (Tr. 254).

In July of 2000, Katherine confronted Dr. Noellsch at the gym (Tr. 86). Katherine told Dr. Noellsch that she loved her husband and her family and asked Dr. Noellsch to quit working out with him (Tr. 87, 466). Dr. Noellsch repeatedly responded that she had nothing to say to her and that Katherine needed to talk to her husband (Tr. 88, 467). Dr. Noellsch did not quit working out with David, despite Katherine's pleas (Tr. 88). Shortly after that time, David admitted to his wife for the first time that he had developed a physical as well as social relationship with Dr. Noellsch (Tr. 293, 295).

Dr. Noellsch testified that she went out socially with David for the first time

in the second or third week in June, 2000 (Tr. 70, 459, 461). In early July, 2000, they began their sexual relationship (Tr. 68). They spent the night at the Radisson Hotel in Kansas City on the July 4th weekend (Tr. 73). In September, they took a trip to St. Louis (Tr. 73). In October, they took a trip to Branson (Tr. 73).

Katherine had been a client of Mr. Don Christensen, who was a clinical social worker, during her divorce from David Helsel (Tr. 397-398). Mr. Christensen testified that Katherine had presented to his office as an upset, sad, and hurt individual (Tr. 408). He diagnosed Katherine with adjustment disorder with anxiety and depression (Tr. 411). He recalled Katherine's indication that David had some financial concerns about conceiving a second child, but she never expressed to him that she had tricked David into a second pregnancy (Tr. 412, 418). Instead, the guilt Katherine revealed to Mr. Christensen was related to her sense that she had failed in her relationship and let people down (Tr. 412). In her sessions with Mr. Christensen, Katherine indicated that even after she had counter-filed for divorce, divorce was not what she wanted (Tr. 416).

On June 27, 2000, David re-filed for divorce, this time in Buchanan County (Tr. 254). In January, 2001, the judgment for the dissolution of the marriage was entered (L.F. 2, Tr. 68, 325). On March 22, 2001, David filed his Motion to Modify the dissolution judgment (Tr. 314). On March 27, 2001, Katherine then

filed her Alienation of Affections lawsuit against Dr. Noellsch (L.F. 1, Tr. 314). The Respondent states in her Brief that she was not served with David's Motion to Modify the dissolution judgment until April 2, 2001, about a week after she filed her Peition (Tr. 324). However, at trial Katherine testified that she discussed both the Motion to Modify and alienation of affection action during a meeting with her attorney before the action was filed. (Tr. 316). Dr. Noellsch and David Helsel were married in February, 2002 (Tr. 471). She is now Dr. Sivi Noellsch Helsel.

Kathleen Helsel's lawsuit against the wife of her former husband was tried before a jury in the Circuit Court of Buchanan County, Judge Randall R. Jackson presiding (L.F. 8-10). At the close of all the evidence, Dr. Noellsch moved for a directed verdict which was denied (Tr. 330). The jury returned a verdict for the plaintiff and awarded her actual damages of $50,000.00 and punitive damages of $25,000.00 (L.F. 9). The Court entered judgment upon the jury's verdict for the plaintiff (L.F. 26). Dr. Noellsch filed her motion for judgment notwithstanding the verdict and alternatively for a new trial or remittitur (L.F. 26). Dr. Noellsch asked the trial court to abolish the tort of alienation of affection in Missouri, and the trial court declined to do so (Tr. 561, L.F. 14, 18). The Court then denied the post- trial motions (Tr. 561, L.F. 14, 18). Dr. Noellsch timely filed her notice of appeal (L.F. 19).

Points Relied On

I. The trial court erred in not abolishing the tort of alienation of affection because the tort is based on an antiquated public policy, rejected by the Supreme Court when it abolished the tort of criminal conversation, in that criminal conversation and alienation of affection are both based on an outdated concept that a person is the property of his or her spouse, and in that the rejection of criminal conversation on public policy grounds by the Supreme Court compels the abolition of alienation of affection.

Thomas v. Siddiqui, 869 S.W.2d 740 (Mo. 1994)

Townsend v. Townsend, 708 S.W.2d 646 (Mo. banc 1986)

Wyman v. Wallace, 615 P.2d 452 (Wash. 1980)

Fundermann v. Mickelson, 304 N.W.2d 790 (Iowa 1981)

II. The trial court erred in not directing a verdict in favor of the appellant at the close of evidence or granting judgment n.o.v because the respondent failed to prove a submissible case of alienation of affection, in that the only evidence that the respondent produced of any alleged wrongful conduct on the part of the appellant was her agreeing to go out on a first date with Mr. Helsel after he had made his decision to divorce, after he had conveyed his decision to the respondent, and after the time he actually filed for divorce.

Comte v. Blessing, 381 S.W.2d 780 (Mo. 1964)

Gibson v. Frowein, 400 S.W.2d 418 (Mo. 1966)

PJ's Concrete Construction, Inc. v. Gust, 983 S.W.2d 640 (Mo. App. 1999)

Stewart v. Kirkland, 929 S.W.2d 321 (Mo. App. 1996)

Argument

I. The trial court erred in not abolishing the tort of alienation of affection because the tort is based on an antiquated public policy, rejected by the Supreme Court when it abolished the tort of criminal conversation, in that criminal conversation and alienation of affection are both based on an outdated concept that a person is the property of his or her spouse, and in that the rejection of criminal conversation on public policy grounds by the Supreme Court compels the abolition of alienation of affection.

Standard of Review

The trial court was asked to abolish the tort of alienation of affection. The decision to abolish a tort is question of law. The *de novo* standard of review governs pure questions of law. *Keisker v. Farmer*, 90 S.W.3d 71, 74 (Mo. 2002). The Supreme Court is free to substitute its own judgment for that of the trial court. *All Star Amusement, Inc. v. Director of Revenue*, 873 S.W.2d 843, 844 (Mo. banc 1994)*; Franklin v. I.N.S.*, 72 F.3d 571, 572 (8th Cir. 1995).

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This Court should now abolish the tort of alienation of affection in Missouri because the tort is premised on the antiquated Anglo-Saxon property law concept that the spouse and the spousal affection are chattel that can be stolen by a third party. The clear nationwide trend of the law is not to treat people or their affections as chattel or property. Alienation of affection, abandoned by a clear majority of the states, has its origin in an ancient property law that a wife is her husband's chattel. *Hoye v. Hoye*, 824 S.W.2d 422 (Ky. 1992). The Kentucky Supreme Court in the *Hoye* case undertook a historical overview of the tort of intentional interference with the marital relations and noted that, as a judicially adopted common law action, it included the torts of criminal conversation, enticement, and alienation of affection. *Id*. at 425. In medieval times, the Anglo-Saxons based the actions against the third parties who tortiously interfered with the marriage as a cause of action in trespass. "The wife was considered a servant to her husband, his chattel. Thus, since the wife was a superior servant, an action was available to include the loss of her services by enticement." *Id* at 424. As Dean Prosser noted, "criminal conversation, enticement and alienation of affection still are often treated as separate torts, but there is no good reason for distinguishing them." Prosser, THE LAW OF TORTS, Chapter 24, at 898 (3rd ed. 1964). Early English common law established two causes of action which "for some purposes can be regarded as different means by which the marriage relationship is subjected

to interference." PROSSER AND KEETON ON THE LAW OF TORTS, § 124 at 917-919.

> "The first, enticement (also called abduction), involved assisting in inducing a wife to leave her husband by means of fraud, violence, or persuasion. The injury was considered to be the loss of the wife's services or consortium. Enticement (or abduction) has evolved into what is commonly known today as the tort of alienation of affection. The second tort remedy available to an injured spouse at early common law was seduction, which today is commonly known as the tort of criminal conversation." Comment, *Stealing Love in Tennessee: the Thief Goes Free*, 56 Tenn. L. Rev. 629 (1989).

There is a tendency in the courts "to lump all these together, or even to hold that there is but one tort which may be accomplished by different means." Prosser & Keeton, *supra* at 919. The torts of alienation of affection and criminal conversation have long since come and gone in most jurisdictions. The thirty four states including the District of Columbia which have abolished alienation of affection by statute are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Indiana, Kansas, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, West Virginia,

Wisconsin, and Wyoming. In six states, the courts have abolished alienation of affection. *Hoye v. Hoye,* 824 S.W.2d 422 (Ky. 1992); *Fundermann v. Mickelson,* 304 N.W.2d 790 (Iowa 1981); *Wyman v. Wallace,* 615 P.2d 452 (Wash. 1980); *O'Neil v. Schuckardt,* 733 P.2d 693 (Idaho 1986); *Russo v. Sutton*, 422 S.E.2d 750 (S.C. 1992); and *Dupuis v Hard,* 814 S.W.2d 340 (Tenn. 1991). Louisiana never accepted this as a cause of action. *See Oldhausen v. Brown,* 372 So.2d 787 (La. Ct. Apps. 1979). Alaska never recognized the cause of action. Alienation of affection remains as a cause of action in only nine states. *Veeder v. Kennedy,* 589 N.W.2d 610 (S.D. 1999).

This Court has previously abolished the companion cause of action of criminal conversation in Missouri. When it did so, it recognized society's intent not to provide an additional cash reward for suffering from adultery. *Thomas v. Siddiqui*, 869 S.W.2d 740 (Mo. 1994). As Prosser in THE LAW ON TORTS (3rd edition, 1964) noted, at p. 898, "There is no good reason for distinguishing" criminal conversation, enticement, and alienation of affection because they "represent three forms of interference with aspects of the same relational interests." This Court should apply its holding in *Thomas v. Siddiqui* and now abolish the tort of alienation of affection in Missouri. "The idea that one spouse can recover for an act the other spouse has willingly consented to is perhaps better suited to an era that regarded one spouse as the property of another . . ." Prosser & Keeton, *supra*

at 917. The reasons for abolishing the tort of alienation of affection are the same as this Court relied on for abolishing its sister tort of criminal conversation.

As this Court pointed out, "another remedy exists to compensate the plaintiff spouse: conduct during the marriage – including adultery – is a factor that the court considers in dividing marital property after dissolution." *Thomas v. Siddiqui*, *supra* at 741.

Further, the Court noted, "in Missouri, the General Assembly repealed the crime of adultery in 1979 [citations omitted]. Decriminalizing the act constituting criminal conversation evidenced society's intent no longer to punish adultery." *Id.* at 742. So too, for the same reason, the tort of alienation of affection should be abolished. Other incentives exist to discourage adultery including the possible award of a smaller share of property in a dissolution of marriage.

The virtue of the common law is that in applying precedents to facts in actual controversies the appellate courts fashion consistent rules of societal behavior which are rational and which reflect the values of society. There can be no rational justification for continuing to recognize the tort of alienation of affection when its twin, the tort of criminal conversation, has been abolished on public policy grounds. American courts are now abolishing these outdated claims. The trend is strong, persistent, and without contrary movement. Missouri joined that trend when it abolished criminal conversation. The case of *Thomas v.*

Siddiqui did not present the question of the alienation of affection to this Court. Indeed, the Court expressly referred to its survival, 867 S.W.2d at 744. The reasoning in *Thomas* would have required the abolition of alienation of affection if the plaintiff had presented his claim for it to the Supreme Court. (That claim had been litigated in the trial court in *Thomas*, but the appeal on that count was dismissed for procedural reasons. *Id.* at 741.) As Judge Price noted in his concurring opinion in *Thomas:* "Many of the reasons that support abolishing the tort of criminal conversation also apply to alienation of affection. Hopefully, the idea of having a 'property right' in another person is long since passed. While I agree that we should attempt to protect marriage and the family unit, I doubt that lawsuits for money serve that goal. More often than not such suits will only continue the pain and abuse the parties have already suffered. Without the issue being raised, briefed, and before us, I believe it is poor jurisprudence to anticipate whether such a tort should continue in existence, or in what form it should continue." *Id.* at 742.

The current situation in Missouri lacks the cardinal virtue of the common law: consistent rules. It is jurisprudentially inconsistent to abolish criminal conversation and to continue to recognize its twin. Such an inconsistency is neither rational or reflective of societal values in the twenty-first century.

Perhaps the New Mexico Court of Appeals in considering this issue, best

enunciated the ineffective, yet burdensome nature of this tort when it noted:

> "It is difficult to envision how the cuckolded spouse or lover could successfully state a claim in tort against the third party, whatever the label, without simultaneously trammeling the privacy rights and liberty interest of the other spouse, as the former spouse or partner. We do not see how we could recognize such conduct as tortious and not, in effect, create a legal right in a husband or paramour to the affections and loyalty of his partner . . .we conclude that freely-made sexual decisions between adults in this case are not actionable in tort." *Padwa v. Hadley*, 981 P.2d 1234 (N.M. App. 1999).

In *Fundermann v. Mickelson, supra,* the Iowa Supreme Court abolished the action of alienation of affection because it was concerned that such suits were absolutely useless as a means of preserving families, but instead demeaned the parties and the courts as well as placing an impossible burden on the juries to determine factual issues without undue emotion and sympathy for the plaintiff. The Court noted:

> Human experience is that the affections of persons who are devoted and faithful are not susceptible to larceny – no matter how cunning or stealthy." 304 N.W.2d 790, 791.

The Washington Court of Appeals in *Wyman v. Wallace*, 549 P.2d 71 (Wash. 1976), reasoned that a viable marriage is not one in which an outsider can successfully interfere and disrupt. The Washington Court observed:

> "We find so little possible social utility in the action, when balanced against the social and individual harm that it can cause, that we cannot justify it in contemporary society. The action brings out in the plaintiff spouse deceit, jealousy, and greed. A prime motivation for bringing the action is often the need of the plaintiff to vindicate his or her position and justify one's own past short comings." 549 P.2d at 73.

The Washington Supreme Court agreed in *Wyman v. Wallace*, 615 P.2d 452, 455 (Wash. 1980), and stated:

> "The Court of Appeals was furthermore correct in concluding that actions for alienation of a spouse's affection should be abolished in this state. The Court of Appeals explained that the action should be eliminated for the following reasons: (1) The underlying assumption of preserving martial harmony is erroneous; (2) The judicial process is not sufficiently capable of policing the often vicious out-of-court settlements; (3) The opportunity for blackmail is great since the mere bringing of an action could ruin a defendant's reputation; (4) There are no helpful standards for assessing damages; and (5) The successful

plaintiff succeeds in compelling what appears to be a forced sale of the spouse's affections."

In the early stages of Anglo-Saxon law, the wife was considered the property or chattel of the husband who could sue a trespasser for stealing the love and affection of his wife. Later, the Married Women's Property Acts extended this tort action to the wives. Over time, the courts and society in general have increasingly recognized that individual consent is central to the contemporary marital relationship–not only to its creation, but to its maintenance as well. Increasingly, there is both implicit and explicit recognition in the law that marital partners are individuals, each with a separate intellectual and emotional makeup. To allow recovery against a third party for loss of a spouse's affections now runs counter to the central principles in our modern legal system that recognize individual autonomy. The voluntariness of the conduct of the participating spouse completely bars the plaintiff's tort action against a third party in the overwhelming majority of American jurisdictions. The courts and the state legislatures have recognized that the ancient assumption that this type of lawsuit would preserve marital harmony has been proven to be erroneous. The courts were not able to prevent the blackmail that occurred when the potential plaintiff threatened the "trespasser" with a lawsuit. There are no clear standards for assessing damages for this relic of a tort. The successful plaintiff is able to compel the forced sale of the former spouse's affections.

It is time for Missouri to end this affront to modern sensibilities and to join the overwhelming trend of modern case law in other jurisdictions. This Court should follow the legal rationale and spirit of *Thomas v. Siddiqui*, *supra*, where this Court abolished its sister tort, criminal conversation.

As this Court noted in *Thomas*, at 741: " This Court has the authority to abolish common law torts. *Townsend v. Townsend*, 708 S.W.2d 646, 649-50 (Mo banc 1986). 'With the disappearance of the reason the thing disappears; when the reason for a rule of law fails, the rule fails.' *State ex inf. Norman v. Ellis*, 325 Mo. 154, 28 S.W.2d 363, 369 (Mo. banc 1930)."

The time has come to abolish the cause of action for alienation of affection.

II. The trial court erred in not directing a verdict in favor of the appellant at the close of evidence or granting judgment n.o.v. because the respondent failed to prove a submissible case of alienation of affection, in that the only evidence that the respondent produced of any alleged wrongful conduct on the part of the appellant was her agreeing to go out on a first date with Mr. Helsel after he had made his decision to divorce, after he had conveyed his decision to the respondent, and after the time he actually filed for divorce.

Standard of Review

"The standard of review of denial of a j.n.o.v. is essentially the same as for review of denial of a motion for directed verdict." *Giddens v. Kansas City Southern Railway Co.*, 29 S.W.3d 813, 818 (Mo. banc 2000). "On appeal from a judgment notwithstanding the verdict, appellate courts review the evidence and reasonable inferences favorable to the jury verdict and disregard contrary evidence that does not support the verdict." *Lewis v. FAG Bearings Corp.*, 5 S.W.3d 579, 581 (Mo. App. 1999); *PJ's Concrete Construction, Inc. v. Gust*, 983 S.W.2d 640, 642 (Mo. App. 1999). "To make a submissible case, substantial evidence is required for every fact essential to liability." *PJ's Concrete*, 983 S.W.2d at 642 (quoting *Steward v. Goetz*, 945 S.W.2d 520, 528 (Mo. App. 1997)). "A motion for judgment notwithstanding the verdict should be granted if an essential element in the cause of action is not supported by substantial evidence." *Stewart v. Kirkland*, 929 S.W.2d 321, 322 (Mo.

App. 1996). In reviewing for a submissible case, courts must accept all evidence and reasonable inferences favorable to the verdict, disregarding contrary evidence. *Missouri Highway & Transportation Commission v. Kansas City Cold Storage, Inc.*, 948 S.W.2d 679, 685 (Mo. App. 1997) (citing *Bayne v. Jenkins*, 593 S.W.2d 519, 521 (Mo. banc 1980)). A motion for j.n.ov. should only be granted when there is no room for reasonable minds to differ as to the ultimate disposition of the case. *Id.* (citing *Wiegers v. Fitzpatrick*, 766 S.W.2d 126, 128 (Mo. App. 1989)).

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The elements of a cause of action for alienation of affection are the defendant's wrongful conduct, the plaintiff's loss of affection or consortium of his spouse, and the causal connection between such conduct and the loss. *Comte v. Blessing*, 381 S.W.2d 780, 781 (Mo. 1964). To state it another way:

An action for alienation of affection or consortium is based on inherently wrongful acts intentionally done which have the natural and probable consequences of alienation of affection of the spouse of the plaintiff, and which in the particular case, had that result. *Gibson v. Frowein*, 400 S.W.2d 418, 421 (Mo. 1966).

Respondent Katherine Helsel failed to produce substantial evidence that Appellant Dr. Noellsch, now Dr. Helsel, acted wrongfully and intentionally so as to *cause* David Helsel's affection to shift from Katherine to Dr. Noellsch, and that David's affection did in fact shift *because* of Dr. Noellsch's conduct.

In April, 2000, David Helsel informed Katherine that their marriage was over. The next month, he filed for divorce. He cited irreconcilable differences in the petition for divorce. He testified that he waited to file until after their second child was born in May, 2000, but that he had planned on divorcing Katherine since September, 1999. David testified that he stopped loving Katherine long before he decided in September, 1999, that he wanted to divorce her. Thus, David had lost affection for Katherine long before any incidents alleged to support the cause of action occurred.

Katherine Helsel testified that when David told her in April, 2000, that he wanted to divorce, David was adamant that he did not want to go to marriage counseling despite her requests. While Katherine may have adduced evidence that she wanted the marriage to work, she presented no evidence that David then wanted the marriage to work. Instead, the record reveals that David was firmly committed to divorcing her from the moment he found out she was pregnant again, against his wishes. David's stated lack of affection for his wife was not contradicted by his actions nor any other witnesses' testimony during the course of the trial. While David expressed interest in temporarily improving their relations for the sake of their daughter's Christmas experience in 1999 (Tr. 354), he maintained that the marriage could not be preserved (Tr. 355, 385). David testified that he decided to tell Katherine of his intent to divorce her when the issue of renewing her teaching contract for the next school year arose. This was supported by Katherine's

testimony that the discussion about divorce came up when she mentioned not working the next year. David wanted Katherine to have an independent income for the following year, because he knew he would no longer be there to support her. Dr. Noellsch and David were no more than friends until David filed for divorce. It was David, not Dr. Noellsch, who first introduced the idea that the two could become more than friends. (Tr. 162, 461-462, 479). It was David who pursued the idea of beginning a relationship. He repeatedly asked Dr. Noellsch for dates. (Tr. 162, 462). Dr. Noellsch Noellsch testified that when she did finally agree to see David socially, she considered the fact that David was separated and had already filed for divorce.

Missouri law recognizes that conduct after separating and filing for divorce is considered differently than conduct during the course of a marriage. *Balven v. Balven*, 734 S.W.2d 909, 913 (Mo. App. 1987) (holding that husband's admitted affair after the parties separated provided an insufficient basis for an unequal award); *Burtscher v. Burtscher*, 563 S.W.2d 526, 528 (Mo. App. 1978) (holding that the trial court did not abuse its discretion when it made a slightly disproportionate division in favor of the husband because the "husband's misconduct, if any, occurred near or after the parties' separation.") Missouri law holds that filing for divorce and separating represents a significant dividing line for expectations of married partners's conduct. Thus, Dr. Noellsch's view that David was free to begin new relationships is supported by Missouri law. It would seem to be the theory of the

respondent at the trial that this rule in dissolution of marriage cases is not applicable here. Rather, she contended that she was entitled to a judgment for money if David showed any interest in Dr. Noellsch at any time before the date of the decree of dissolution of marriage. If so, the respondent's position is consistent with the theory underlying the tort: her husband remained her *property* until he was no longer her husband, even after she no longer had any reasonable expectation of mutual fidelity since they had separated.

Katherine Helsel produced no substantial evidence that Dr. Noellsch acted wrongfully or intentionally to shift David's affection and attention to her. Katherine Helsel did not present any evidence that Dr. Noellsch acted in an even remotely seductive manner at any time prior to the time to the date he filed for divorce.[1]

Katherine certainly presented no evidence at all of misconduct by Dr. Noellsch prior to the date David in fact decided to divorce Katherine in September, 1999. Dr. Noellsch did nothing wrong. She was a person David apparently found attractive. David saw her on a somewhat regular basis in her capacity as chiropractor. He occasionally ran into her at the gym. Katherine produced no

[1]Counsel for respondent was able to elicit testimony at least five different times during the trial that Dr. Noellsch had a good figure, wore low-cut shirts, and worked out. If these appearance-enhancing behaviors are to be viewed by the courts as indicia of tortious intent to induce, how will the courts view contact lenses, girdles, and hair dye?

substantial evidence that Dr. Noellsch's conduct made David stop loving her.

The receptionist at David Helsel's office testified that Dr. Noellsch sent flowers to David twice before June, 2000, but she was not able to pinpoint a date in any fashion. David pursued Dr. Noellsch and had expressed to her that "the marriage was over" before Dr. Noellsch agreed to date him. There was a series of calls between the two in the spring, 2000, concerning a lawsuit faced by Dr. Noellsch over a non-compete agreement. They would occasionally discuss matters outside of legal issues (Tr. 105). However, they maintained that they were only friends throughout the time that the calls took place. It was David who initiated every call during this period (Tr. 464).

Experience teaches us that people are imperfect, can be fickle, may fall out of love, and may decide to get out of a marriage for reasons that others do not understand. They may go on to start new relationships. This is what happened in this case. No reasonable jury could infer from the evidence of this case that there was a causal connection between Dr. Noellsch's actions and David's falling out of love with his wife and deciding to end his marriage.

Conclusion

The appellant asks the Supreme Court to abolish the tort of alienation of affection in Missouri now.

In the alternative, the appellant asks the Court to reverse the judgment and remand the case for entry of judgment in favor of the appellant on the grounds that the respondent did not prove a submissible case.

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Certificate of Compliance

I hereby certify that the disk enclosed has been scanned for viruses and is virus free and that I used Word Perfect for word processing. I further certify that this brief complies with Rule 84.06(b) word limitations and that the brief contains 7,749 words.

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Attorney

Certificate of Service

I hereby certify that I mailed a disk and a copy of this New Brief of the Appellant to Craig Ritchie, Attorney, Suite A, 1006 West St. Martin's Drive, St. Joseph, Missouri 64506, counsel for the respondent, on this 9th day of May, 2003.

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Attorney

APPENDIX